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Leong Heng Kuang v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–35 OF 2011
AZHAR MA'AH, APANDI ALI AND AZIAH ALI JJCA
1 AUGUST 2012

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Criminal Law — Murder — Appeal — Penal Code s 300 — Appeal against conviction and sentence — Whether prima facie case established — Defence of intoxication — Whether defence created any reasonable doubt

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The appellant was convicted and sentenced to death for two offences under s 300 of the Penal Code for the murder of two women namely, Miss Kaemika Pusuvan ('the first deceased') and Mrs Phordee Seemuang ('the second deceased'). The appellant and the first deceased were lovers and had been living together for about four years. The appellant had known the second deceased for

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a long time as she was the first deceased's good friend. The appellant's next door neighbors, SP7 and SP8 were husband and wife. According to SP7, as she was cleaning near the fence of her house one day, she saw a lot of blood at the rear of the appellant's house. Both SP7 and SP8 decided to ask the second deceased who then went to the appellant's house unaccompanied. SP7 later said that the

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second deceased told her that the appellant did not allow her to meet the first deceased she was sleeping. About 10 minutes later they saw the appellant walking towards the second deceased's house and the second deceased followed the appellant back to her house. This was followed by the sound of the second deceased screaming for help and running towards their house with the

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appellant running after her. SP8 said that he saw the appellant holding a knife. The second deceased ran into the compound of the appellant's house and entered the house. SP7 said that she told the appellant to stop. SP8 said that he saw the appellant holding a knife and feeling frightened, both SP7 and SP8 went into their house and locked the door. SP7 then called the police.

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According to SP8 when he looked through the window he saw the second deceased lying on the road. Upon his arrival, the police investigating officer ('IO') testified that the appellant was sitting in front of the house and was shown the incriminating weapon and the deceased bodies. Under

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cross-examination, SP10 disagreed with the defence counsel's suggestion that the appellant looked insane. At the end of the prosecution's case, the court was satisfied that a prima facie had been established and the accused was later convicted and sentenced in accordance with the charge. In the present appeal, the appealed against his conviction and sentence.

Held, dismissing the appeal and affirming the conviction and sentence of court below:

(1) There was no merit in the contention that the IO ought to have sent the appellant for psychiatric evaluation merely for the reason that he did not flee after killing the first deceased. Apart from this, there was nothing to indicate or arouse any suspicion on the part of the IO that the accused was intoxicated. There was no basis for the criticism made against the IO. On the evidence adduced by the prosecution, the court was unable to agree with learned counsel that the learned trial judge ought to have amended the charge to an offence of culpable homicide (see para 8).

(2) Nothing turns on the psychiatric report referred to by the learned trial judge since the report was prepared long after the event. There was other evidence sufficient for the learned trial judge to assess the appellant's state of mind. The learned trial judge's reference to the psychiatric report was insufficient to amount to misdirection (see para 13).

(3) The court disagreed that the trial judge ought to have accepted the appellant's testimony that he was intoxicated due to consumption of syabu. Mere assertions were insufficient to discharge the burden of proof placed on the appellant by s 105 of the Evidence Act 1950 (see para 15).

(4) Even if the appellant's allegation that he had consumed 'syabu' before committing the crimes was true, the appellant was sober enough to remember that he was angry when the first deceased did not respond to his questions. Circumstances of this case showed that his mental faculties were not so diminished to the extent that he did not know that the injuries caused by his act of stabbing both the deceased persons would be sufficient in the ordinary course of nature to cause death. This case fell within the ambit of s 300(c) of the Penal Code and the learned trial judge had not erred in finding that the appellant had failed to prove his defence of intoxication (see para 16).

[Bahasa Malaysia summary

Perayu telah disabitkan dan dihukum mati kerana dua kesalahan di bawah s 300 Kanun Kesaksaan kerana telah membunuh dua wanita iaitu, Cik Kaemika Pusuvan ('si mati pertama') dan Puan Phordee Seemuang ('si mati kedua'). Perayu dan si mati pertama merupakan pasangan kekasih dan telah tinggal bersama lebih kurang empat tahun. Perayu telah lama mengenali si mati kedua kerana dia merupakan kawan baik si mati pertama. Jiran-jiran bersebelahan perayu, SP7 dan SP8 merupakan pasangan suami isteri. Menurut SP7, ketika dia mengemas berhampiran pagar rumahnya ada suatu hari, dia ternampak banyak darah di bahagian belakang rumah perayu. Kedua-dua SP7 dan SP8 membuat keputusan untuk bertanya kepada si mati kedua yang kemudian telah pergi ke rumah perayu tanpa ditemani. SP7 kemudian berkata bahawa si mati kedua memberitahunya bahawa perayu tidak

membenarkannya berjumpa dengan si mati pertama kerana dikatakan sedang tidur. Lebih kurang 10 minit kemudian mereka lihat perayu berjalan ke arah rumah si mati kedua dan si mati kedua mengikut perayu balik ke rumahnya. Ini diikuti dengan bunyi jeritan si mati kedua meminta tolong dan lari ke arah rumah mereka dengan perayu mengejarnya. SP8 mengatakan bahawa dia melihat perayu memegang pisau. Si mati kedua berlari ke halaman rumah perayu dan memasuki rumah itu. SP7 berkata bahawa dia memberitahu perayu untuk berhenti. SP8 berkata dia melihat perayu memegang pisau dan berasa takut, kedua-dua SP7 dan SP8 masuk ke dalam rumah mereka dan mengunci pintu. SP7 kemudian memanggil polis. Menurut SP8 apabila dia melihat menerusi tingkap dia melihat si mati kedua terbaring berlumuran dadah di atas jalan. Setibanya di rumah itu, pegawai penyiasat polis itu ('IO') memberikan keterangan bahawa perayu sedang duduk di hadapan rumah dan ditunjukkan senjata yang membabitkan kesalahan itu dan mayat-mayat si mati tersebut. Semasa pemeriksaan balas, SP10 tidak bersetuju dengan cadangan pembelaan peguam bahawa perayu kelihatan tidak waras. Di akhir kes pendakwaan, mahkamah berpuas hati bahawa kes prima facie dapat dibuktikan dan tertuduh kemudian telah disabitkan dan dihukum menurut pertuduhan tersebut. Dalam rayuan ini, adalah rayuan terhadap sabitan dan hukuman tersebut.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman mahkamah bawahan:

(1) Tiada merit dalam hujah bahawa IO tersebut patut menghantar perayu untuk penilaian psikiatrik hanya kerana sebab yang dia tidak lari selepas membunuh si mati pertama. Selain itu, tiada apa-apa untuk menunjukkan atau menimbulkan rasa syak wasangka di pihak IO tersebut bahawa tertuduh mabuk. Tiada asas untuk kritik dibuat terhadap IO. Berdasarkan keterangan yang dikemukakan oleh pendakwaan, mahkamah tidak dapat bersetuju dengan peguam bijaksana bahawa hakim perbicaraan yang bijaksana patut meminda pertuduhan tersebut kepada kesalahan pembunuhan menyebabkan kematian (lihat perenggan 8).

(2) Tiada apa-apa dalam laporan psikiatrik yang dirujuk oleh hakim perbicaraan yang bijaksana kerana laporan itu telah disediakan lama selepas kejadian. Terdapat keterangan lain yang mencukupi untuk hakim perbicaraan yang bijaksana menilai keadaan pemikiran perayu. Rujukan hakim perbicaraan yang bijaksana kepada laporan psikiatrik tidak mencukupi untuk membentuk salah arah (lihat perenggan 13).

(3) Mahkamah tidak bersetuju bahawa hakim perbicaraan patut menerima keterangan perayu bahawa dia dalam keadaan mabuk akibat mengambil

syabu. Dakwaan semata-mata tidak mencukupi untuk melepaskan beban bukti yang diletakkan ke atas perayu oleh s 105 Akta Keterangan 1950 (lihat perenggan 15).

(4) Walaupun pengataan perayu bahawa dia mmengambil syabu sebelum melakukan jenayah adalah benar, perayu masih sedar diri untuk ingat yang dia marah apabila si mati pertama tidak menjawab soalannya. Keadaan kes ini menunjukkan pemikirannya tidak pudar sehingga tidak mengetahui kecederaan yang disebabkan oleh tindakannya menikam kedua-dua si mati adalah mencukupi dalam keadaan biasa menyebabkan kematian. Kes ini terangkum dalam skop s 300(c) Kanun Keseksaan dan hakim perbicaraan yang bijaksana tidak terkhilaf dalam mendapati bahawa perayu telah gagal untuk membuktikan pembelaan mabuknya (lihat perenggan 18).]

Notes

For cases on appeal, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1457–1459.

Cases referred to

Kenneth Fook Mun Lee v PP [2007] 2 MLJ 130; [2006] 4 CLJ 359, FC (refd)
PP v Mohd Nor Riza bin Mat Tahar [2011] 2 MLJ 21; [2009] 4 CLJ 691; [2009] 1 LNS 511, FC (refd)
PP v Ramasamy a/l Sebastian [1991] 1 MLJ 75, HC (refd)

Legislation referred to

Evidence Act 1950 s 105
Penal Code s 85, 85(2)(a), (2)(b), 86(2), 300, 300(c), 304(a), (b)

Appeal from: Criminal Trial No 45–09 of 2008 (High Court, Alor Setar)

Kitson Foong (Ahmad Zaidi & Partners) for the appellant.
Nadia Hanim bt Mohd Tajuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Aziah Ali JCA (delivering judgment of the court):

[1] The appellant was convicted and sentenced to death for two offences under s 300 of the Penal Code for the murder of two women namely, Miss Kaemika Pusuvan (the first deceased) and Mrs Phordee Seemuang (the second deceased) on 26 October 2006 at 5am and 9.50am respectively. He appealed to this court against his conviction and sentence. The only issue raised before us was the defence of intoxication. Having considered the appeal record and heard submissions we unanimously dismissed his appeal and affirmed the decision of the Alor Star High Court.

[2] The background facts that culminated in the murder of the two women had been laid out by the learned trial judge in his grounds of judgment. For the purpose of this judgment we reproduce the relevant facts relating to the relationship of the appellant and the first deceased and the events that occurred on the night of 25 October 2006 and on the morning of 26 October 2006 that ended with the death of the first deceased and her friend, the second deceased.

[3] According to the appellant he had known the first deceased for quite some time and they had lived together at various places. He had been living together with the first deceased for about four years. He admitted they were lovers. Despite this the appellant only knew that the first deceased was from Thailand. He did not even know her full name. The appellant had also known the second deceased for a long time. She was the first deceased's good friend.

[4] SP7 and her husband SP8 were neighbours of the appellant and the first deceased. Their house was a terraced house and was next to the appellant's house. It was SP7 who called the police. According to her on the morning of 26 October 2006 after she returned from sending her children to school she cleaned and mopped her house. When she went near the fence of her house she saw a lot of blood at the rear of the appellant's house. She felt frightened and called her husband SP8 who was at work. SP8 came home at approximately 9am and after a discussion they decided to ask the second deceased who lived five houses away to come over. SP7 went over to the second deceased's house and told the second deceased about the blood and her suspicion that something had happened to the first deceased. The second deceased then went to the appellant's house but SP7 did not accompany her. Instead SP7 went back to her house. SP7 said that later the second deceased told her that the appellant did not allow her to meet the first deceased because the first deceased was sleeping. About 10 minutes later they saw the appellant walking towards the second deceased's house and the second deceased followed the appellant back to her house. Then they heard the second deceased screaming for help and running towards their house with the appellant running after her. SP8 said that he saw the appellant holding a knife. The second deceased ran into the compound of the appellant's house and entered the house. SP7 said that she told the appellant to stop ('jangan buat'). SP8 said that he saw the appellant holding a knife and feeling frightened both he and SP7 went into their house and locked the door. SP7 then called the police. According to SP8 when he looked through the window he saw the second deceased lying on the road.

[5] SP10 ASP Noom a/l Achoom the investigating officer ('IO') testified that on arrival at the scene he found the appellant sitting on a chair in front of the house. SP10 said that the appellant was quiet and looked scared. SP10 found blood outside the fence of the appellant's house, in the living room, on the door and a female corpse in the kitchen area covered in blood (the first deceased). At

the rear of the house SP10 found more blood. He then questioned the appellant about the weapon used and the appellant pointed to him a knife on a shoe rack in front of the main door of the house about 10 metres away from where the appellant was sitting. SP10 then checked the outside of the house and by the side of house No B68 he found another female corpse and underneath the corpse he found a house key. The key belonged to the house occupied by the second deceased. Under cross-examination SP10 disagreed with defence counsel's suggestion that the appellant looked 'tidak siuman'.

[6] At the end of the prosecution case the learned trial judge found sufficient evidence to show that no other person but the appellant who had caused the injuries found on the two deceased persons and that the prosecution had established a prima facie against the appellant. The appellant was thereupon called to enter his defence.

[7] Before us learned counsel submitted that at the end of the prosecution case or at the end of the defence case the learned trial judge ought to have amended the charge to culpable homicide punishable under s 304(a) or (b) of the Penal Code. Counsel referred to evidence which showed that when the police arrived at the scene the appellant was present and did not run away and looked frightened. This, it was submitted, showed that the appellant did not have the intention to kill. It is further submitted that the behaviour of the appellant should have prompted the IO to send the appellant for observation. Counsel submitted that the appellant was deprived of raising the defence of intoxication because the IO did not at any time send the appellant for psychiatric evaluation. For the respondent learned deputy public prosecutor ('DPP') submitted that counsel for the appellant did not make any request for the appellant to be sent for psychiatric evaluation until the court ordered the appellant to enter his defence (p 75 appeal record). Learned DPP submitted that even if the court had erred, there was sufficient evidence before the trial judge to enable His Lordship to assess and make a finding on the appellant's state of mind. Learned DPP submitted that though it was alleged that the appellant was intoxicated, his behaviour did not support his allegation because he was able to respond to questions posed by the IO to him soon after the incident and he could remember details when asked.

[8] We find no merit in learned counsel's submissions that the IO ought to have sent the appellant for psychiatric evaluation merely for the reason that he did not flee after killing the first deceased, and was sitting quietly on a chair in front of the house and he responded to the IO's question by pointing to the knife on the shoe rack. Apart from this there was nothing to indicate or arouse any suspicion on the part of the IO that the accused was intoxicated. In cross-examination the IO disagreed with the suggestion by learned counsel that the appellant looked 'tidak siuman'. Neither SP7 nor SP8 was asked by defence

counsel whether they suspected that the appellant was or looked intoxicated. Thus we find no basis for the criticism made against the IO. On the evidence adduced by the prosecution we were unable to agree with learned counsel that the learned trial judge ought to have amended the charge to an offence of culpable homicide.

[9] The appellant chose to give his evidence on oath. According to the appellant, on the night of 25 October 2006 at about 10pm the first deceased wanted to go out but he did not allow her to do so. They quarreled but the first deceased still left the house. According to him he knew that the first deceased had been seeing another man but he denied that he was jealous. He then consumed the drug 'syabu' because he could not sleep. He said that he had been taking 'syabu' for two months. When the first deceased returned home at about 5am, the appellant said that the first deceased did not say anything but went to the kitchen. In the kitchen he questioned the first deceased why she had gone out for a long time but the first deceased did not answer. When the first deceased failed to answer they quarreled and he took a knife and stabbed her. He then went and sat in front of the house. Then at about 9am the appellant said that the second deceased came and started to scold him in the Thai language which he could not understand and because of this he stabbed the second deceased. He used the same knife with which he had stabbed the first deceased. The second deceased ran and he chased her and when she fell, he went back to sit in front of the house and soon afterwards the police arrived.

[10] Learned counsel in his written submissions submitted that the learned trial judge ought to have accepted the testimony of the appellant that he was not of sound mind (*tidak berfikiran waras*) at the material time due to his consumption of 'syabu'. Counsel submitted that the learned trial judge had erred in his finding that the appellant had failed to prove his defence under s 85(2)(b) of the Penal Code when the evidence showed that prior to the incident the appellant had consumed 'syabu'.

[11] Section 85 of the Penal Code provides as follows:

> 85 Intoxication when a defence.
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> (1) Save as provided in this section and in section 86, intoxication shall not constitute a defence to any criminal charge.
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> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and —
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> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

[12] In *Public Prosecutor v Mohd Nor Riza bin Mat Tahar* [2011] 2 MLJ 21; [2009] 4 CLJ 691; [2009] 1 LNS 511 the respondent voluntarily consumed a can of beer just before the incident. His defence was that he did not know what he was doing by reason of intoxication. It was a defence under ss 85(2)(b) and 86(2) of the Penal Code. In his judgment Hashim Yusoff FCJ said:

> On the defence of intoxication, s 85 of the Penal Code clearly spells out when intoxication could be a defence 'if the person charged at the time of the act … complained of did not know that such act … was wrong or did not know what he was doing and
>
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act …
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> [12] But it is clear from the evidence adduced that it was the respondent who voluntarily consumed a can of beer just before the incident. Self-induced intoxication is not a defence under s 85(2)(a) of the Penal Code …

On the authority of *Mohd Nor Riza* above self-induced intoxication is not a defence. Thus the defence under s 85(2)(a) was not available to the appellant who alleged that he had consumed 'syabu' prior to the incidents.

[13] In his grounds of judgment the learned trial judge had found that the defence of intoxication was merely the appellant's allegation which was not supported by any evidence. The learned trial judge considered that after the appellant was called to enter his defence, defence counsel had requested for.the appellant to be sent for psychiatric evaluation. The learned trial judge referred to a psychiatric evaluation which apparently showed that the appellant 'didapati waras untuk menghadapi perbicaraan dan juga pada masa kejadian' (p 132 of the appeal record). Learned counsel submitted that the trial judge had erred in referring to a psychiatric report when the notes of proceedings did not show that any psychiatrist had been called to testify nor was any psychiatric report tendered in evidence. We were of the view that nothing turns on the psychiatric report referred to by the learned trial judge since the report was prepared long after the event. We agreed with learned DPP that there were other evidence sufficient for the learned trial judge to assess the appellant's state of mind. The learned trial judge's reference to the psychiatric report was insufficient to amount to a misdirection.

[14] It was contended that the failure of the learned trial judge to accept the appellant's testimony was a material misdirection and fatal to the conviction.

Learned DPP submitted that the defence under s 85 of the Penal Code was raised only to support the contention that the appellant had no intention to kill by reason of intoxication. It was submitted that when this defence was raised, the burden of proof shifted to the appellant (s 105 of the Evidence Act 1950; *Kenneth Fook Mun Lee v Public Prosecutor* [2007] 2 MLJ 130; [2006] 4 CLJ 359). Learned DPP submitted that the totality of evidence showed that the appellant was not truthful. Further the defence had failed to call any witness to testify as to his state of mind. Learned DPP submitted that if the appellant had consumed 'syabu' he would not have remembered the first deceased's conduct and the time when she returned home that morning. He remembered that they quarreled and suspected that the first deceased had spent the night at another man's house. The appellant also remembered that the second deceased had scolded him in the Thai language. Thus all the evidence were inconsistent with the appellant's contention that he was intoxicated. Therefore it is submitted that the appellant had failed to discharge his burden of proof.

[15] To prove intoxication it is encumbered upon the defence to adduce sufficient evidence to convince the court that intoxication had rendered the accused incapable of forming the necessary intention or knowledge to commit the crime charged, or that he was by reason of intoxication insane, temporarily or otherwise, at the time when he committed the crime (*Public Prosecutor v Ramasamy a/l Sebastian* [1991] 1 MLJ 75). We were unable to agree with learned counsel that the trial judge ought to have accepted the appellant's testimony that he was intoxicated due to consumption of 'syabu'. In *Public Prosecutor v Mohd Nor Riza bin Mat Tahar* Hashim Yusoff FCJ said:

> … in this instant appeal, there was no scientific evidence to support any intoxication of the respondent, having considered his conduct before and after the commission of the crime. It was obvious that the respondent knew what he was doing (see: *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481).

In our considered opinion mere assertions without more is insufficient to discharge the burden of proof placed on the appellant by s 105 of the Evidence Act 1950 which states as follows:

> 105 Burden of proving that case of accused comes within exceptions.
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> When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

The appellant admitted that he stabbed the first deceased because she did not respond to his question as to why she had gone for a long time. So the stabbing was inflicted in retaliation to the first deceased's non-response to his questions. In respect of the second deceased the evidence showed that he killed her

approximately 4–5 hours after he had killed the first deceased. His explanation for stabbing the second deceased was because she had scolded him. On the evidence we agreed with the learned trial judge that the appellant had failed to prove his defence.

[16] Section 300 of the Penal Code provides:

> Except in the cases hereinafter excepted, culpable homicide is murder —
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> (a) if the act by which the death is caused is done with the intention of causing death;
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> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
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> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or
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> (d) if the person committing the act knows that it is imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

A knife is a dangerous weapon to use to attack another person. The extent and nature of the injuries that the appellant had inflicted on both the deceased persons as testified by SP2 showed that the injuries were inflicted with the intention to cause such bodily injury sufficient in the ordinary course of nature to cause death. We were of the considered view that even if the appellant's allegation that he had consumed 'syabu' before committing the crimes was true, the appellant was sober enough to remember that he was angry when the first deceased did not respond to his questions. He was sober enough to remember that the second deceased scolded him in Thai. There was also evidence that he chased after the second deceased and he only stopped when she fell. The circumstances of this case showed that his mental faculties were not so diminished to the extent that he did not know that the injuries caused by his act of stabbing both the deceased persons would be sufficient in the ordinary course of nature to cause death. We find sufficient evidence that this case fell within the ambit of s 300(c) of the Penal Code and the learned trial judge had not erred in finding that the appellant had failed to prove his defence of intoxication. We therefore dismissed the appellant's appeal and affirmed the conviction and sentence.

Appeal dismissed and conviction and sentence of court below affirmed.

Reported by Afiq Mohamad Noor